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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: BARCLAYS LIQUIDITY CROSS  
AND HIGH FREQUENCY TRADING 14 MD 2589 (JMF)  
LITIGATION

New York, N.Y.  
April 16, 2018  
2:15 p.m.

Before:

HON. JESSE M. FURMAN

District Judge

APPEARANCES

ROBBINS GELLER RUDMAN & DOWD LLP  
Attorneys for Plaintiffs City of Providence and  
State-Boston Retirement System  
BY: PATRICK J. COUGHLIN  
DAVID W. MITCHELL

LABATON SUCHAROW LLP  
Attorneys for Plaintiff State-Boston Retirement System  
BY: THOMAS A. DUBBS

MOTLEY RICE LLC  
Attorneys for Plaintiff Employees' Retirement System of  
the Government of the Virgin Islands  
BY: JOSHUA C. LITTLEJOHN

COTCHETT PITRE & MCCARTHY LLP  
Attorneys for Plaintiff Great Pacific Securities  
BY: ALEXANDER E. BARNETT



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APPEARANCES (Continued)

GIBSON DUNN & CRUTCHER LLP

Attorneys for Defendant Nasdaq OMX BX

and The Nasdaq Stock Market LLC

BY: AMIR C. TAYRANI

LEVINE LEE LLP

Attorneys for Defendant Chicago Stock Exchange

BY: CHRISTOS PAPAPETROU

BAKER BOTTS LLP

Attorneys for Defendant NYSE Arca, Inc.,

and New York Stock Exchange LLC

BY: DOUGLAS W. HENKIN

SCHIFF HARDIN LLP

Attorneys for Defendant Bats Global Markets, Inc.

BY: PAUL E. GREENWALT



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(Case called)

(In open court)

MR. MITCHELL: Good afternoon, your Honor. David Mitchell from Robbins Geller Rudman & Dowd on behalf of plaintiff.

MR. COUGHLIN: Good afternoon, your Honor. Patrick Coughlin on behalf of plaintiffs.

MR. DUBBS: Good afternoon, your Honor. Thomas Dubbs from Labaton for plaintiffs.

MR. LITTLEJOHN: Good afternoon, your Honor. Josh Littlejohn on behalf of plaintiffs.

MR. GREENWALT: Good afternoon, your Honor. Paul Greenwalt on behalf of Bats Global Markets.

MR. PAPAPETROU: Good afternoon, your Honor. Christos Papapetrou from the firm of Levine Lee, on behalf of the Chicago Stock Exchange.

MR. HENKIN: Good afternoon, your Honor. Douglas Henkin on behalf of the two NYSE defendants.

MR. TAYRANI: Good afternoon, your Honor. Amir Tayrani from Gibson Dunn & Crutcher for defendants Nasdaq Stock Market and Nasdaq OMX BX.

THE COURT: All right. Good afternoon to all of you. I can't say that the diversity at counsel table is particularly impressive, but that's OK. And I don't know if we have any members of the press here, but I guess you drew the short straw



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1 on which proceedings you had to cover this afternoon.

2 Welcome back, I suppose. I got your letter of April  
3 12 with slightly different proposals of how to proceed from  
4 here. Before we go there, let me just cover a few housekeeping  
5 matters. I takes it everybody is in agreement that the Flynn  
6 matter should be closed. Is that correct?

7 MR. COUGHLIN: Yes, your Honor.

8 MR. HENKIN: Yes, your Honor.

9 THE COURT: All right. In general if you could tell  
10 me who you are when you say something, so the record is clear  
11 as to who is speaking, that would be helpful.

12 Second, Forsta AP-fonden should be terminated? I  
13 don't know, I haven't checked whether it appears in multiple  
14 cases or just in one, but everybody in agreement about that?

15 MR. COUGHLIN: Patrick Coughlin. Yes, your Honor.

16 MR. HENKIN: Douglas Henkin. Yes, your Honor.

17 THE COURT: All right. And I think that the Great  
18 Pacific case may have been reopened when these cases came back,  
19 but everybody is in agreement that that case is no longer  
20 before me, I take it?

21 MR. COUGHLIN: Patrick Coughlin. Yes, your Honor.

22 MR. HENKIN: Douglas Henkin. Correct, your Honor.

23 THE COURT: And relatedly, I take it Barclays is no  
24 longer a party in any of the cases pending before me.

25 MR. COUGHLIN: Patrick Coughlin. That is correct,



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1 your Honor.

2 MR. HENKIN: Douglas Henkin. Correct, your Honor.

3 THE COURT: All right. Very good. And then, lastly,  
4 plaintiffs agree that the Section (6)(b) claims are no longer  
5 part of the case, correct?

6 MR. COUGHLIN: Patrick Coughlin. That's correct, your  
7 Honor.

8 THE COURT: Great. All right.

9 So, in terms of how to go from here, I've read your  
10 letter and respective positions. I do not intend to await a  
11 cert petition. I don't see any reason not to proceed. If cert  
12 is granted, then we can decide what, if anything, to do in that  
13 instance, but it's a sufficient long shot that I don't see any  
14 reason to hold things up.

15 At the same time, I'm not going to rely solely on the  
16 briefs that you filed two to three years ago. Number one, for  
17 all I know, the law has developed in the interim. Number two,  
18 while it may be that defendants devoted only a handful of pages  
19 to the issues that remain open, I would rather get more  
20 substantial briefing because it would be helpful to me in  
21 rendering a decision on these issues.

22 So for those two reasons I will have a new round of  
23 briefing. But, number three, I'm inclined to do so on a faster  
24 schedule than defendants proposed at the end of the letter. I  
25 don't see any reason why you would need close to a month and a



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1 half to file your briefs. I'm not contemplating or envisioning  
2 particularly long briefs or longer than the default local rules  
3 provide -- namely 25 pages, 25 pages and ten pages -- and given  
4 that, and even allowing for some time to coordinate among the  
5 different defendants, I would think we could proceed more  
6 quickly than that. So, we can talk about proposed schedule. I  
7 guess I could throw out a proposed schedule.

8 Then the only last thing that I had on that front is  
9 defendants avert in a letter to the issue flagged by the  
10 Circuit in footnote five of its opinion concerning an argument  
11 raised by the SEC that it did not reach and indicate that they  
12 may want to raise that issue before me.

13 I guess I wanted to just flag that. I don't know if  
14 we want to discuss it now. Maybe the best course is to let  
15 defendants raise it and both sides address whether procedurally  
16 it would be proper to raise an argument at this point or not.

17 The Circuit's footnote says that they could not make a  
18 determination based on the pleadings, and the parties have not  
19 briefed the issue before me or that court. Obviously, the  
20 latter could be remedied by briefing the issue before me, but  
21 if the issue is not one that could be decided on the pleadings,  
22 I don't see why it could be decided at this juncture either.  
23 But perhaps we can discuss that.

24 Mr. Coughlin?

25 MR. COUGHLIN: Yes. I don't think -- the way this



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1 issue --

2 THE COURT: Can you find a microphone.

3 MR. COUGHLIN: The way this issue comes up, your  
4 Honor, is that we are at the pleading stage, and I think that  
5 the parties have a different idea. The defendants argued that  
6 the SEC had all the information as to the three things that we  
7 complain about -- the co-location, the data feeds and the order  
8 times -- and we take a different view of what the SEC had  
9 before it and what it could rule on, I think the preclusion  
10 argument isn't ripe until the facts are developed.

11 THE COURT: All right. Back table?

12 MR. HENKIN: Douglas Henkin for the exchanges. We  
13 obviously have a different view on that. We think that the SEC  
14 touched on the issue and raised it. We think your Honor's  
15 initial inclination that we should brief it and see how it  
16 turns out is the right answer. That way we at least have the  
17 record. We can make the argument as we think the SEC put it  
18 forward in the amicus brief, and obviously if the plaintiffs  
19 disagree with it, they will say so, and your Honor can decide  
20 it based on full briefing, which we anticipate doing it a  
21 little more justice than the SEC did in the amicus brief.

22 THE COURT: And what do you make of the Circuit's  
23 reference to its inability to make a determination based on the  
24 pleadings?

25 MR. HENKIN: Well, I think part of that was the fact



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1 that the SEC disclaimed -- although the SEC raised the issue,  
2 the SEC decided to take no position on it, and in fact  
3 indicated, if you look at the amicus brief, that it would be  
4 inappropriate for the SEC to take a merits position on it  
5 because of its role in the actual regulatory process itself.

6 We think that that's something that we can address in  
7 our papers, and that that's not going to be an impediment to  
8 your Honor addressing it.

9 THE COURT: All right. And does either side have a  
10 view on whether the SEC should be invited to participate in  
11 these proceedings on remand?

12 MR. HENKIN: Well, your Honor, the one thing -- and I  
13 don't mean to cut off the other side -- but the one thing that  
14 I would imagine is that based on what they said in the amicus  
15 brief, they seem to indicate that they didn't want to take --  
16 that they felt it was inappropriate for them to take a merits  
17 position on that because of where they stand in the regulatory  
18 aspect.

19 THE COURT: OK.

20 MR. COUGHLIN: Your Honor, I don't think we're asking  
21 for SEC's involvement at this time on this issue. If you're  
22 inclined to have it briefed, we will do it. We still take the  
23 position that the parties are not at the pleading stage of what  
24 is before the SEC, and you can't make that analysis without the  
25 factual record being developed.



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1 THE COURT: All right, very good.

2 So I guess it seems like the best course is to let the  
3 defendants make the argument and again to address not just the  
4 substance of it but whether procedurally I should consider it  
5 at this stage, given that it was not argued in the first  
6 go-around under 12(b)(6).

7 But to the extent that the counter argument is that  
8 it's a factual issue and it goes beyond the pleadings, then you  
9 should make that argument; and, if you're right, then it's  
10 easily resolved.

11 Now in terms of schedule, I would propose, as I said,  
12 a shorter schedule with an opening brief due on May 18,  
13 opposition due on June 15 and reply due on June 29.

14 Any objection?

15 MR. MITCHELL: David Mitchell for plaintiffs. No  
16 objection for plaintiffs, your Honor.

17 MR. HENKIN: Your Honor, no objection from the  
18 defendants.

19 THE COURT: Great. Anything else that we need to do?

20 MR. MITCHELL: I don't think so for plaintiffs, your  
21 Honor.

22 Thank you.

23 MR. HENKIN: Not on the defendant's side, your Honor.

24 THE COURT: All right. Well, thank you for your  
25 letter, which helpfully laid out the issues and made this an



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1 efficient conference, and now you can go try and catch the end  
2 of things across the street. Thank you very much. Have a good  
3 day.

4 (Adjourned)